88-1841

Supreme Court, U.S.
FILED
APR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

Indiana Civil Rights Commission, and
Donna Marie Witte, Petitioners

v.

American Commercial Barge Line Company

Petition For A Writ of Certiorari To The Indiana Court Of Appeals

LEGAL DIVISION OF THE INDIANA
CIVIL RIGHTS COMMISSION
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PUBLISHER'S NOTE:

Original Pagination is not continuous.

The petitioners, the Indiana Civil Rights Commission and Donna Marie Witte, petition this Court for a writ of certiorari to review the decision of the Indiana Court of Appeals.

QUESTIONS PRESENTED

1. Does 28 U.S.C. §1333(1) prevent the Indiana Civil Rights Commission from adjudicating an employment discrimination case which arises under the Indiana Civil Rights Law but involves a maritime employer hiring employees to work on the navigable waters of the United States?

2. Does the admiralty and maritime jurisdiction of the United States preempt the application of the Indiana Civil Rights Law's handicap discrimination provisions to a resident maritime employer who hires employees within the state of Indiana to work on the navigable waters of the United States?

PARTIES

All the petitioners are named in the caption. The respondent, American Commercial Barge Line Company is a wholly owned subsidiary of American Commercial Lines. American Commerical Lines also owns Inland Tugs and MAC Towing. CSX Incorporated owns American Commercial Lines.

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OPINIONS BELOW

The opinion of the Indiana Court of Appeals (App.A, 1a-9a) is reported at 523 N.E.2d 241. The decisions of the hearing officer (App.B, 10a-16a), the Indiana Civil Rights Commission (App. C. 17a-34a), and the Clark Superior Court No. 1 (App. D, 35a-43a), are not reported. The Indiana Court of Appeals' denial of appellants' petition for rehearing (App.E, 45a), and the Indiana Supreme Court's denial of transfer (App.F, 47a), are not reported.

JURISDICTION

The Indiana Court of Appeals entered its opinion on May 17, 1988. The commission and Witte filed their Petition For Rehearing

on June 6, 1988. The court of appeals denied their petition on July 5, 1988. The commission and Witte filed their Petition For Transfer To The Indiana Supreme Court on July 25, 1988. The Indiana Supreme Court denied their petition on January 4, 1989. 28 U.S.C. §1257(3) gives this Court jurisdiction to review the court of appeal's decision by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, of the United States Constitution states the following, in applicable part:

> Section 2. The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction.

2. 28 U.S.C. §1333(1) states the following:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. IC §22-9-1-3(1) states the following, in applicable part:

(l) "Discriminatory practice" means: (1) the exclusion of a person from equal opportunities because of race, religion, color, sex, handicap, national origin, or ancestry;

. . .

Every discriminatory practice relating to the acquisition or sale of real estate, education, public accommodations, employment, or the extending of credit (as "credit" is defined in IC 24-4.5-1-301) shall be considered unlawful unless it is specifically exempted by this chapter.

4. IC §22-9-1-13(a) states the following:

Sec. 13(a) The prohibition against discrimination in employment because of handicap does not apply to failure of an employer to employ or to retain as an employee any person who because of a handicap is physically or otherwise unable to efficiently and safely perform, at the standards set by the employer, the duties required in that job.

STATEMENT OF THE CASE

The Indiana state legislature declared that it is the public policy of Indiana to insure that all of its citizens have equal opportunity for education, employment, access to public accommodations, and the acquistion of real estate, regardless of their race, religion, color, sex, handicap, national origin, or ancestry. IC §22-9-1-2. It passed the

Indiana Civil Rights Law, IC §22-9-1-1 through IC §22-9-1-13, to effectuate this policy. Among other things, the law makes it unlawful for employers to deny people employment opportunities because of their handicap. IC §22-9-1-3(1). The civil rights law created the Indiana Civil Rights Commission to enforce its provisions. IC §22-9-1-4. It gives the commission the power to receive, investigate, and adjudicate complaints involving handicap discrimination in employment. IC §22-9-1-6(e) and IC §22-9-1-6(j)(1). The commission has the power to enter an enforceable order against any employer found to have violated the law. IC §22-9-1-6(k).

American Commercial Barge Line Company (ACBL) is a wholly owned subsidiary of American Commercial Lines. American Commercial Lines also owns Inland Tugs and MAC Towing. Inland and MAC operate a fleet of towboats and barges on the navigable inland waterways of the United States. ACBL provides Inland and MAC with a variety of administrative services, including the hiring and training

of their employees. ACBL maintains its headquarters and offices in Jeffersonville, Indiana.

On November 12, 1982, Donna Marie Barone applied with ACBL for a job as a cook on board one of the towboats. Barone was qualified to cook, but is blind in her right eye. She has had this condition since birth. ACBL denied her a job because of her handicap.

On May 6, 1983, Barone filed a complaint against ACBL with the Indiana Civil Rights Commission. In it, she charged that ACBL violated the civil rights law by denying her a job because of her handicap.

The commission investigated Barone's charge. ACBL admitted denying Barone a job because she is blind in one eye. It had a rule which keeps people from working on its vessels who have monocular vision. ACBL claimed that safety considerations justify this rule.

Donna Marie Barone got married during the course of this proceeding. Her last name changed from Barone to Witte. The commission

changed the proceeding's title to reflect her change of name.

The commission's director found probable cause against ACBL on April 9, 1984. This means that she thought there was enough evidence of the law being violated to warrant a public hearing. See 910 IAC 1-1-1(Q). She assigned the case to a staff attorney. He tried unsuccessfully to conciliate the case. See 910 IAC 1-3-2(b). On February 22, 1985, the commission determined that conciliation had failed. It decided that a hearing officer should be appointed. See 910 IAC 1-3-5. The commission's chairman appointed Robert D. Lange to act as hearing officer.

On April 25, 1985, ACBL filed a motion to dismiss. In this motion, ACBL argued that federal law and admiralty jurisdiction preempts the application of the Indiana Civil Rights Law to those hiring decisions it makes regarding crewmembers who will work on the navigable waters. ACBL cited two reasons for this. First, it claimed that state laws have no application on the navigable waters. Second,

it claimed that the federal doctrine of seaworthiness required ACBL to exclude Barone from employment because it perceived her to be dangerous (R.39-43).

The hearing officer denied ACBL's motion (R.48-52, App.B, 10a-16a). He rejected ACBL's claim that state laws do not apply on the navigable waters. ACBL did not cite a single case which supported its proposition. It did not show that Congress expressly preempted the field by legislation, or that federal law so pervasively regulates the field that there is no room left for state regulation. The hearing officer also rejected ACBL's claim that the doctrine of seaworthiness directly conflicts with the handicap discrimination provisions of the civil rights law. The civil rights law allows ACBL to refuse to hire anyone who is unseaworthy.

On December 3, 1985, the hearing officer conducted a public hearing to determine the merits of the case. Witte produced the following evidence at the hearing. People who are blind in one eye lack physical depth

perception and have a somewhat narrowed field of vision. However, they learn to judge distances. This is called acquired depth perception. They also learn to compensate for their narrowed field of vision by moving their good eye. Most people with monocular vision can function as well as people having binocular vision.

Witte testified that she has been blind in her right eye since birth. She functions as well as any person who has vision in both eyes. She had an unrestricted driver's license. She drove in all kinds of weather, but had never had an automobile accident. She participated in sports which require depth perception, like softball and volleyball.

ACBL produced the following evidence at the hearing. Michael Sheehan, ACBL's manager of training, safety, and labor relations, stated that ACBL's minimum vision requirement came from the recommendations of the National River Academy, the American Waterways Operators, and the U.S. Coast Guard. The National River

Academy and the American Waterways Operators are private, maritime industry, councils. The U.S. Coast Guard is a federal law enforcement agency.

These organizations recommended standards to upgrade the maritime industry. These standards set minimum requirements in a number of areas, including vision. The vision standard requires minimum vision of 20/100 in one eye, correctable to 20/50, and 20/70 in the other eye, correctable to 20/30. ACBL adopted these recommended standards.

The industry's recommended minimum vision requirement keeps people with monocular vision from working on maritime vessels. The industry believes that having people with monocular vision on board its vessels would create a danger, because such people lack depth perception and have a narrowed field of vision. ACBL did not establish that these maritime organizations considered the concept of acquired depth perception when they formulated their minimum vision requirement. Sheehan was a member of AWO's health and safety

committee when he testified.

Sheehan also stated that the minimum vision requirement was based on his own experience in maritime safety. Sheehan has alot of experience in the field of maritime safety, but he did not have specialized training regarding the visually impaired.

Both parties agreed that working on a commerical towboat can be very dangerous. Disasters can happen at any time. Any member of the crew might have to respond in an emergency. Each crewmember has to be able to pull his own weight.

On January 20, 1986, the hearing officer entered his Recommended Findings of Fact, Conclusions of Law, and Order (R.177-186, App.C, 21a-34a). He concluded that ACBL failed to prove the business necessity of its rule which denies employment to people having monocular vision. He also found that Witte's handicap would not keep her from doing the job of cook safely and efficiently. Therefore, he awarded her $45,986.64 in lost wages, a job, and retroactive seniority. He also ordered ACBL to stop

using monocular vision as a reason for denying someone a job.

On January 31, 1986, ACBL filed its Objections To Recommended Findings of Fact, Conclusions of Law, and Order, with the full commission (R.187-205). See IC §4-22-1-12 and 910 IAC 1-12-1(B). In it ACBL argued that admiralty and maritime law preempts the application of the Indiana Civil Rights Law to its decision not to hire Witte. ACBL also argued that the law's prohibition of handicap discrimination directly conflicts with the maritime doctrine of seaworthiness.

On May 16, 1986, the Indiana Civil Rights Commission entered its Findings of Fact, Conclusions of Law, and Order (R.215-227, App.C, 17a-34a). The commission affirmed the hearing officer in all respects, and adopted his recommended order as its own. See 910 IAC 1-12-1(B).

On May 29, 1986, ACBL filed its Verified Petition For Judicial Review with the Clark Superior Court No. 1. See IC §4-22-1-14. In

it, ACBL raised the same admiralty and maritime law issues as it had raised to the commission.

On April 9, 1987, the Clark Superior Court No. 1 entered its Proposed Findings of Fact, Conclusions of Law, Judgement (R.490-496, App.D,35a-43a). The court reversed the commission. It held that applying the Indiana Civil Rights Law to the admiralty jurisdiction of the United States is unlawful. It also held that the maritime industry standards which ACBL relied on in forming its own minimum vision requirement define the standard of seaworthiness. Since these standards conflict with the civil rights law's prohibition of handicap discrimination, they preempt the law.

The commission and Witte appealed the superior court's order to the Indiana Court of Appeals. On May 17, 1988, the court entered a written opinion in the case (App.A, 1a-9a). The court upheld the Clark Superior Court No. 1. It based its decision on two grounds. First, 28 U.S.C. §1333(1) gives the federal district courts exclusive original jurisdiction in any civil case involving

admiralty and maritime jurisdiction. The court decided that this is an admiralty case, because it involves the operation of vessels on the navigable waters. Second, the admiralty and maritime jurisdiction of the United States preempts the application of the Indiana Civil Rights Law. Giving the maritime industry standards the status of seaworthiness is necessary to promote uniformity within the industry.

The commission and Witte filed a Petition For Rehearing with the court of appeals on June 6, 1988. The court denied this petition on July 5, 1988 (App.E, 45a). On July 25, 1988, the commission and Witte filed a Petition For Transfer To The Indiana Supreme Court. On January 4, 1989, the Indiana Supreme Court denied their petition (App.F, 47a). Consequently, they now ask this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A.

Statement Of Error

This case raises the question of whether a

state can apply its handicap discrimination statute to a resident employer who is hiring employees to work on the navigable waters of the United States. The Indiana Court of Appeals decided that it cannot. The court erred in reaching this conclusion, as the following discussion will make clear.

1. The Indiana Court of Appeals decided that 28 U.S.C. §1333(1) gives the federal district courts exclusive jurisdiction over all civil cases involving admiralty and maritime jurisdiction. The court reasoned that hiring seamen affects the operation of the vessel. Since the operation of the vessel is a traditional maritime activity to which the admiralty jurisdiction extends, maritime employment falls within the exclusive jurisdiction of the federal courts.

The court's reasoning completely ignores the language of 28 U.S.C. §1333(1). 28 U.S.C. §1333(1) gives the federal district courts exclusive jurisdiction over all admiralty and maritime cases "saving to suitors in all cases all other remedies to which they are otherwise

entitled." The quoted language expressly reserves to suitors the right to bring their suits in state court, even though their suits involve matters also covered by admiralty law.

Wright, Miller & Cooper states the following about the "savings to suitors" clause:

> The effect of the "savings to suitors" clause essentially is to provide a plaintiff who has an in personam claim the choice of proceeding in an ordinary civil action, rather than bringing a libel in admiralty. A plaintiff who has an admiralty or maritime claim-for example, a claim for damages for breach of a maritime contract - thus has the following options. First, the claimant may involve federal admiralty jurisdiction under the grant of original subject matter jurisdiction over admiralty, maritime, and prize cases set out in Section 1333. . . Second by virute of the "savings clause," plaintiff also may sue at law in a state court or in a United States district court. However, to pursue the latter choice, the requirement of diversity of citizenship and jurisdictional amount must be satisfied.

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3672, pages 430 through 433.

The "savings to suitors" clause reserves to the Indiana Civil Rights Commission the right to adjudicate employment discrimination claims against resident maritime employer. 28 U.S.C. s1333(1) merely prevents it from adjudicating admiralty and maritime claims along with them. The court of appeals erred in concluding that the commission acted in excess of its jurisdiction.

2. The court of appeals also decided that it was necessary to apply the recommended standards of the American Waterways Operators, the National River Academy, and the U.S. Coast Guard, as the standard of seaworthiness in this case. The court thought that it was necessary to do this because it will "preserve uniformity within the industry."

The court's decision is erroneous for at least three reasons. Each of these reasons is discussed below.

First, the court failed to apply the right standard of seaworthiness in this case. Admiralty law considers a crew member seaworthy if he is reasonably fit to perform the work at hand. He does not have to be competent to meet all contingencies, but does have to be equal in disposition and seamanship to ordinary men of the calling. See Keen v. Overseas Tankship Corp. (1952), C.A.2, 194 F.2d 515, Boudoin v. Lykes Brothers Steamship Co., Inc. (1955), 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, and Matter of Texaco, Inc. (1983), D.C.La., 570 F.Supp. 1272.

Second, the court applied the wrong standard to determine seaworthiness in this case. The court decided that maritime industry standards should set the standard of seaworthiness. This is clearly error. Maritime industry standards do not set the standard of seaworthiness. Seaworthiness is a court-developed legal standard.

In Bryant v. Partenreederai-Ernest Russ (1964), C.A.4, 330 F.2d 185, the Fourth

Circuit Court of Appeals confronted the argument that prevailing trade customs should set the standard of seaworthiness. The court replied to this argument as follows:

> Additionally, we think that the trial court attempted to limit the standard of reasonable fitness as determined by prevailing customs of the trade. This is demonstrated by the language of the trial court that the S.S. Christian Russ was deemed seaworthy because it was "as fit for service as similar vessels in similar service." It is an established principle, however, that in negligence actions under the Jones Act, prevailing trade customs cannot furnish the legal standard of due care (citation omitted). This being true, we fail to perceive any logical reason why trade customs should be permitted to form the legal standard of seaworthiness in actions under general maritime law.

330 F.2d 185, 189. The court went on to state:

> At best, evidence of prevailing industry standards may be considered as some evidence that the ship in question is in fact seaworthy. It may never be conclusive. Any other view would be at odds with Mr. Justice Rutledge's admonition that the duty to provide a seaworthy ship and appurtenances is "a form of absolute duty owing to all within the range of its humanitarian policy."

330 F.2d 185, 190.

The Bryant case involves the seaworthiness of a vessel, not its crew, but the same rule should apply to the seaworthiness of a crew-member. This Court extended the seaworthiness doctrine to crewmembers in the first place because it could find no reason to distinguish between the vessel and its crew. See Waldron v. Moore-McCormack Lines (1967), 386 U.S. 724, and Boudoin v. Lykes Brothers Steam-ship Co., Inc. (1955), 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354.

This case presents a clear example of how an industry standard can depart from the standard of seaworthiness. The prevailing industry standard bans people with monocular vision from working on maritime vessels, But at the hearing. ACBL failed to show that having monocular vision affects a person's ability to function. Instead, the evidence shows that people with monocular vision function just as well as people with binocular vision. Therefore, having monocular vision

does not make a person unseaworthy, even though the prevailing industry standard calls him unfit.

Third, by holding that maritime industry standards take precedent over state law when they conflict, the court of appeals created an immunity from state regulation for the maritime industry which this Court does not recognize. Admiralty and maritime law does not protect maritime employers from having to comply with various state laws. The states still have a wide range in which they can legislate concerning maritime matters. In Romero v. International Terminal Operating Co. (1959), 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed. 2d 368, this Court stated the following:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive over-simplication of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that

> state law yields to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

358 U.S. 354, 373.

This Court has struck down the application of state law only when it finds that the nature of the problem requires a uniform rule, or that the application of state law unduly hampers maritime commerce. In Oil, Chemical, Atomic Workers International Union v. Mobil Oil Company (1976), 426 U.S. 407, 96 S.Ct. 2140, 48 L.Ed. 2d 736, Mr. Justice Stewart wrote the following, in his dissenting opinion:

> It is unnecessary here to delineate the "wide scope" within which the States may legislate about things maritime. To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation preempted only when the nature of the problem required the application of a uniform rule or when state law unduly hampered maritime commerce. See, e.g., Askew v. American Waterways Operators, Inc., 411 U.S. 325, 337-344 (1973); Korisch v. United Fruit Co., 365 U.S. 731, 738-739 (1961); Huron

> Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444 (1960). The Court has never struck down a state law on the ground that the states are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory."

426 U.S. 407, 435-36.

3. Admiralty and maritime law does not prevent Indiana from applying its handicap discrimination law to those hiring decisions ACBL makes within its borders. Preemption cannot be presumed. The party asserting it has to make a clear and convincing case. See People of the State of Illinois v. Kerr-McGee Chemical Corp. (1982), C.A. 7, 677 F.2d 571, Peterman v. Coleman (1985), C.A. 11, 764 F.2d 1416, and Pettis Moving Co., Inc. v. Roberts (1986), C.A.2, 784 F.2d 439.

ACBL did not make a clear and convincing case for the state law's preemption. It did not show that the handicap discrimination provisions directly conflict with the doctrine of seaworthiness. Indiana's "safety and efficiency" provision allows a maritime employer to refuse to hire anyone who is

unseaworthy because of his handicap. See IC §22-9-1-13(a). ACBL did not show that the nature of the problem requires a uniform rule, or that applying the handicap discrimination provisions unduly hampers commerce. Maritime employers are no different than any other multistate corporation. Other multistate corporations have to comply with the hiring laws of each state they hire employees in. Requiring them to do so does not unduly hamper interstate commerce. There is no reason to believe that requiring maritime employers to do the same will unduly hamper maritime commerce.

B.

Why This Writ Should Be Granted

The Indiana Court of Appeals clearly committed error in this case. Unfortunately, judicial error is not rare these days. People from all over the country ask this Court to review their cases. So why should the Court choose this case over all the

others? There are at least four reasons why the writ should be granted.

First, there appears to be alot of confusion over the issue of how far the states can go in regulating the employment practices of maritime employers. The Court needs to clarify this area of law. This case presents an opportunity to do so.

Second, this case is important to the people of Indiana. This case involves alot more than the exclusion of a few people with monocular vision from working on ACBL's vessels. ACBL has a number of minimum physical requirments. These requirments keep alot of handicapped people from working on its vessels. Further, the maritime industry in general follows these requirements. If the court's decision is allowed to stand, all of these people will lose the Indiana Civil Rights Law's protection.

Third, this case has national implications. Currently, forty-seven of fifty states, and the District of Columbia, have laws forbidding handicap discrimination in employment. See

BNA Labor Relations Reporter, Fair Employment Practices Manual, 8A, 451:103. Most of these states have contact with maritime employers. Since the maritime industry generally applies minimum physical standards for employment, the issue of whether the states can apply their handicap discrimination law to maritime employers will come up again and again.

Finally, the court of appeals used federal law to reach a conclusion which is contrary to federal policy. Although there is no general federal law which forbids discrimination on the basis of handicap in employment, federal policy clearly forbids it. See, for example, the Rehabilitation Act of 1973; P.L. 93-112, as amended in 1986 by P.L. 99-506, and in 1987 by P.L. 100-259, codified in 29 U.S.C. §701 et seq. This Court should not allow federal law to be used to contradict federal policy.

C.

Conclusion

The Court should issue a writ of certiorari in this case. The Indiana Court of Appeals erroneously applied federal admiralty law to prevent Indiana from applying its handicap discrimination law to the hiring decisions a resident maritime employer made within its borders. This case raises substantial issues of federal law which have national significance.

Respectfully submitted,

LEGAL DIVISION OF THE
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APPENDIX A

THE TEXT OF THE INDIANA COURT OF APPEALS DECISION

DELIVERED ON MAY 17, 1988

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

INDIANA CIVIL RIGHTS COMMISSION and DONNA MARIE WITTE, Appellants (Respondents Below), vs. AMERICAN COMMERCIAL BARGE LINE COMPANY, Appellee (Petitioner Below).	)	No. 10A01-8708-CV-200

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Clementine B. Barthold, Judge
Cause No. 86-S1-80

RATLIFF, C.J.

STATEMENT OF THE CASE

The Indiana Civil Rights Commission and Donna Marie Witte appeal a Clark Superior Court decision reversing the commission's determination that Witte was a victim of handicap discrimination. We affirm the trial court's decision.

FACTS

American Commercial Barge Line Company (American) is engaged in the business of operating towboats and barges on United States inland waterways. It ships large quantities of coal, grain, steel and liquids. Its headquarters and offices are in Jeffersonville, Indiana. All of American's vessel employees work aboard either barges or towboats in navigable United States waters and have the status of seamen under federal maritime law. They must be capable of performing emergency duties and therefore must meet minimum physical standards. These standards include certain vision acuity requirements.

Witte has been blind in her right eye since birth. In November of 1982, she sought employment as a cook aboard one of American's vessels. She was denied employment on the basis of her monocular vision.

Thereafter, Witte filed an action with the Indiana Civil Rights Commission claiming she was the victim of handicap discrimination. A hearing officer awarded her $45,986.64 in lost wages, an immediate job or the next available job with pay in the interim, and retroactive seniority. He also ordered American to refrain from denying employment to prospective employees with monocular vision. The commission affirmed the hearing officer in all respects.

On May 29, 1986, American filed a verified petition for judicial review. The Clark Superior Court reversed the commission's decision, concluding in essence as follows: 1) that the doctrine of federal preemption applies in this case; 2) that the commission acted in excess of its statutory jurisdiction; 3) fed-

eral law required American to provide a seaworthy crew and vessel; 4) that for American seaworthiness defines business necessity and safety; 5) that Witte failed to meet her burden of demonstrating that the "business necessity" justification used by American in denying her employment was mere pretext. Following the court's reversal, Witte immediately filed this appeal.

ISSUES

Witte raises several issues, which we have restated as follows:

(1) Did the trial court err in concluding that the commission acted in excess of its jurisdiction?

(2) Did the trial court err in concluding that federal maritime and admiralty law preempts the application of Indiana civil rights laws to an employer who employs persons on navigable United States waterways?

(3) Did the trial court erroneously apply the burden of proof as espoused by the

June 30, 1983 and this certification was filed with ICRC on July 7, 1983.

9. Freight moves up or down the river in barges held together by various means and referred to as "the tow." The tow is connected to a towboat which, in reality, pushes them.

10. The most common tow on a locking river, such as the Ohio, consists of fifteen (15) barges arranged in five (5) rows of three (3).

11. The crew on such a vessel will usually number ten (10) people: the Captain (or Master), the Pilot, the Chief Engineer, the Cook, and six (6) deckhands. The typical day is divided into six (6) hour periods called watches. The forward watch (also called the Captain's watch) includes the periods from 6:00 a.m. to noon and 6:00 p.m. to midnight and the after watch includes the other two six hour stretches.

12. The cook is responsible for preparing and serving three (3) meals a day in the galley (or kitchen). These meals are served

during one hour periods beginning at 5:30 a.m., 11:30 a.m., and 5:30 p.m.

13. The cook is also responsible for ordering groceries from the stores along the river. These groceries are delivered along with fuel. The delivery vessel and the towboat continue to move while groceries and fuel are transferred, locked together in some manner. The cook is responsible for transferring the groceries into the galley.

14. Members of a crew typically work thirty (30) days on the vessel and fifteen (15) days off. These tours vary and the entire crew does not necessarily change at one time.

15. Crew members whose tour is starting or ending get on or off the boat wherever they can. This can occur in a variety of ways, including;

A. At a lock, by climbing up (or down) a ladder set in a recess in a concrete wall. The tow will be between the ladder and the towboat in these cases.

Congress to preempt state law. Preemption occurs when a conflict exists between federal and state law. Louisiana Public Service Comm'n v. F.C.C. (1986), 476 U.S. 355, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (citing Free v. Bland (1962), 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180). A conflict may arise when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n (1983), 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (quoting Hines v. Davidowitz (1941), 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581).

Admiralty suits are governed by federal substantive and procedural law. St. Hilaire Moye, 496 F.2d at 980. State law is not permitted to defeat or narrow any substantial admiralty rights of recovery or to contravene the uniformity of maritime matters. Knickerbocker Ice Co. v. Stewart (1920), 253

U.S. 149, 158, 40 S.Ct. 438, 439, 64 L.Ed. 834;

St. Hilaire Moye, 496 F.2d at 980.

> The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states--not derived from or dependent on their will. . . Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which

> framers of the Constitution both foresaw and undertook to prevent.

Knickerbocker Ice, 253 U.S. at 160, 166, 40 S.Ct. at 440, 442.

Under federal maritime and admiralty law, a ship owner warrants the "seaworthiness" of his vessel. Boudoin v. Lykes Brothers Steamship Co. (1955), 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354. This means that the vessel is reasonably fit to carry its cargo. Waldron v. Moore-McCormack Lines, Inc. (1967), 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed.2d 482.

As an employee aboard one of American's vessels, Witte would have been deemed a "seaman." 46 U.S.C. 713. The warranty of seaworthiness, as applied to a seaman, does not mean that the seaman must be competent to meet all contingencies. Rather, the seaman must be "equal in disposition and seamanship" to ordinary persons in the calling. Boudoin, 348 U.S. at 337, 75 S.Ct. at 384 (quoting Keen v. Overseas Tankship Corp. (1952), 2d Cir., 194 F.2d 515, 518).

Under the judicially fashioned doctrine of seaworthiness, American, as a maritime employer, is obligated to furnish a seaworthy vessel and crew. Federal admiralty law therefore requires American to determine Witte's "seaworthiness" as part of its evaluation of her candidacy as a prospective employee.

Indiana civil rights law provides that it is a "discriminatory practice" to deny employment to persons solely on the basis of their handicap. IND. CODE 22-9-1-2.

> [However,] the prohibition against discrimination in employment because of handicap does not apply to failure of an employer to employ or to retain as an employee any person who because of a handicap is physically or otherwise unable to efficiently and safely perform, at the standards set by the employer, the duties required in that job.

IND. CODE 22-9-1-13(a). American's minimum vision standards were based on recommendations made by the associations which regulate the maritime industry. These recommendations were based on expertise in the area of seaworthiness and were designed to promote uniformity within the industry.

The commission failed to apply or even consider the seaworthiness doctrine in evaluating Witte's claim. Instead, it decided her claim based solely on Indiana law. Although Indiana's "safety and efficiency" condition found at IC 22-9-1-13(a) does not conflict directly with the federal seaworthiness doctrine, we conclude that in this case resort to the seaworthiness doctrine was necessary to preserve uniformity within the industry. See, Knickerbocker Ice, supra. Thus, the trial court properly determined that the commission erred by failing to consider and apply federal admiralty law. Accordingly, the decision of the trial court is affirmed.

Affirmed.

NEAL, J. and BUCHANAN, J., concur.

APPENDIX B

THE COMPLETE TEXT OF THE

HEARING OFFICER'S JUNE 26, 1985, ORDER

STATE OF INDIANA

CIVIL RIGHTS COMMISSION

DONNA MARIE BARONE WITTE,

Complainant,

v. DOCKET NO. EMha83050464

AMERICAN COMMERCIAL BARGE LINE COMPANY,

Respondent.

ORDER

Comes now Respondent, American Commercial Barge Line Company ("ACBL"), by counsel, and files its Motion To Dismiss, which Motion is in words and figures as follows:

(H.I.)

And comes now Complainant, Donna Marie Barone Witte ("Witte"), by counsel, and files her Reply To Motion To Dismiss, which Reply is in words and figures as follows:

(H.I.)

And comes now Robert D. Lange, Hearing Officer for the Indiana Civil Rights Commission ("ICRC"), having considered the above and being duly advised in the premises, and finds and

rules as follows:

1. On or about March 8, 1983, Witte (then Donna Marie Barone) was advised that ACBL would not employ her for the position of cook for which she had applied because she failed to meet ACBL's vision requirements. Witte is, and was then, blind in her right eye.

2. Witte filed the instant complaint with ICRC on May 6, 1983, claiming, in substance, that ACBL's rejection of her on that basis was unlawful discrimination because of handicap in violation of the Indiana Civil Rights Law, Ind. Code §22-9-1-1, et. seq. ("the Law").

3. Section 13(c) of the Law requires that a person filing a complaint of handicap discrimination must be certified as "handicapped" as that is defined in the Law [Ind. Code §22-9-1-3(q)] by the Indiana Rehabiliation Services Board ("IRSB").

4. A counselor from IRSB certified Witte on June 30, 1983, and the Certification Of Handicap so indicating was filed with ICRC on July 7, 1983, one hundred twenty-two (122) days after the date of the alleged discriminatory

practice.

5. In Leslie v. Southern Indiana Gas And Electric Company Docket No. EMha83091035 (June 21, 1985), ICRC held that filing a Certification Of Handicap within the time allowed for filing a complaint is not necessary to invoke ICRC's jurisdiction over the subject matter. In the Leslie case, ICRC indicated that such "belated" filing of a Certification may warrant dismissal if proceeding on the merits would be unreasonable under the circumstances.

6. Witte's failure to file a Certification Of Handicap within ninety (90) days of the date of the allegedly discriminatory practice does not deprive ICRC of subject matter jurisdiction.

7. The timing of Witte's filing of the Certification does not make proceeding to the merits unreasonable. As in Leslie, the Certification was filed long before any question was raised about its timeliness.

8. ACBL also contends that state law has

been pre-empted by federal admiralty and maritime law.

9. The doctrine of pre-emption derives from the "supremacy clause" of U.S. Const., Art. VI(2), and applies under any of the following conditions:

(a) Congress expressly pre-empts the field by legislation; or

(b) Federal law so pervasively regulates the field that there is no room for state regulation; or

(c) Federal law and state law are in conflict.

10. ACBL, in its Brief In Support Of Motion To Dismiss, asserts that "...Congress has retained exclusive Admiralty jurisdiction...". (Brief, P.2) In support of that assertion, it cites the U.S. Constitution but not any specific portion thereof. A review of the Constitution reveals no such provision. Indeed, the only reference to admiralty therein concerns the judicial power. U.S. Const., Art. III, §2.

11. ACBL has cited no federal statute expressly pre-empting the field.

12. ACBL has not demonstrated that federal law so pervasively regulates the field that there is no room for state regulation.

13. Oil, Chemical And Atomic Workers International Union, AFL-CIO v. Mobil Oil Corporation (1976), 426 U.S. 407 does not affect the instant case. This case was a suit claiming that an agency shop provision in a collective bargaining agreement was unenforceable because it violated a Texas statute. Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(a)(3), permitted such agreements; however, section 14(b) of the NLRA, 29 U.S.C. §164(b), allowed States to except themselves from §8(a)(3) by enacting what are known as "right-to-work" laws. The Court held that the Texas statute could not apply, though hiring was done in Texas, because the job situs was the high seas and not Texas. The Court reasoned that §§8(a)(3) and 14(b) are concerned with post-hiring matters.

14. Unlike, OCAW, the instant case involves a hiring decision.

15. A conflict between federal and state law exists where one prohibits something that the other requires. No such conflict has been demonstrated.

16. Nowhere in ACBL's Motion or Brief does it suggest that federal law requires it to apply specific vision standards. Federal standards concerning a vessel's crew appear to differ depending on its purpose, weight, and/or destination. Compare 46 U.S.C. §8701(a)(2) and 46 U.S.C §8702(a)(2). Further complicating the matter is ACBL's assertion that it and its affiliates operate "a number of riverboats" (Brief,p.2).

17. The Law defines "handicap", with respect to employment, as a physical or mental condition constituting a substantial disability unrelated to a person's ability to engage in a particular occupation. Ind. Code §22-9-1-3(q). Further, the Law expressly recognizes that it is not unlawful for an employer to fail to employ a person who is to unable to efficiently

and safely perform, at the standards set by the employer, the duties required in that job. Ind. Code §22-9-1-13(a). Thus, whether unlawful discrimination has occurred is not purely a function of the complainant's condition and unique factors concerning the respondent's business or enterprise can be considered. If the law applicable to ACBL requires a higher standard of care in the selection of employees than applies to a "typical" employer, then different results for ACBL and a "typical" employer might be required.

IT IS, THEREFORE, ORDERED

1. ACBL's Motion To Dismiss should be, and the same hereby is, denied.

2. A Final Pre-Hearing Confernce will be held on Friday, September 27, 1988, at 10:00 a.m., Indianapolis time, in the rooms of ICRC.

3. The Hearing Officer will recommend that the Director set this matter for hearing on Tuesday, October 16, 1985, at 9:00 a.m.,

Indianapolis time, in the rooms of ICRC.

Dated: 26 June 1985

S/Robert D. Lange
Robert D. Lange
Hearing Officer

To be served either personally or by certified mail, return receipt requested on the following parties and attorneys of record:

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No. P 508 677 180

and

Mr. Roy D. Rogers
Attorney for Complainant
Donna M. (Barone) Witte
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and

American Commercial Barge
Line Company
c/o Mr. Michael P. Sheehan, Manager
Training, Safety and Labor Relations
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Certified mail
No. P 508 677 181

and

Mr. Robert W. Kilroy
Attorney for Respondent
American Commercial Barge
Line Company
518 East Court Avenue
Jeffersonville, IN 47130
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No. P 508 677 182

APPENDIX C

THE COMPLETE TEXT OF THE INDIANA

CIVIL RIGHTS COMMISSION'S FINAL ORDER

ENTERED ON MAY 16, 1986

STATE OF INDIANA

CIVIL RIGHTS COMMISSION

DONNA MARIE WITTE,

Complainant,

v. DOCKET NO. EMha83050464

AMERICAN COMMERCIAL
BARGE LINE COMPANY,

Respondent.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Comes now Robert D. Lange, Hearing Officer for the Civil Rights Commission ("ICRC"), and enters his Recommended Findings of Fact, Conclusions of Law, And Order ("the recommended decision"), which recommended decision is in words and figures as follows:

(H.I.)

And comes now Respondent, American Commerical Barge Line Company ("ACBL"), by counsel, and files its Objections To Recommended Findings of Fact, Conclusions of Law, And Order, which Objections are in words and figures as follows:

(H.I.)

Everett J. Coleman, Chairman of ICRC, presided at a hearing on said Objections on March 21, 1986. Other commissioners present were Marion Purnell-Young (Vice-Chairperson), Karen L. Anderson, C.T. Boyd, Fred W. Draper, Nedra S. Kinerk, and David L. Staples. ACBL was represented by counsel, Mr. Robert W. Kilroy. Complainant, Donna Marie Witte ("Witte"), was represented by counsel, Mr. Roy D. Rogers. Arguments of counsel were heard and the cause was taken under advisement.

Having carefully considered the arguments of counsel and being duly advised in the premises, ICRC now finds and rules as follows:

1. A party objecting to a recommended decision has the burden of showing error affecting the result.

2. ACBL has not met this burden.

IT IS, THEREFORE, ORDERED

1. ACBL's Objections To Recommended Findings Of Fact, Conclusions Of Law, And Order should be, and the same hereby are, overruled.

2. ICRC hereby adopts as its own the findings of fact, conclusions of law, and order recommended by the Hearing Officer in his recommended decision, a copy of which is attached hereto and incorporated by reference herein.

INDIANA CIVIL RIGHTS COMMISSION

D.L. Staples
COMMISSIONER

F.Draper
COMMISSIONER

Marian Young
COMMISSIONER

C.T. Boyd
COMMISSIONER

Dated: May 16, 1986

To be served either personally or by certified mail, return receipt requested on the following parties and attorneys of record:

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and

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Attorney for Complainant
Donna Marie Witte
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and

American Commercial Barge Line Company
c/o Mr. Michael P. Sheehan, Manager;
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and

Mr. Robert W. Kilroy
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STATE OF INDIANA

CIVIL RIGHTS COMMISSION

DONNA MARIE WITTE,

Complainant,

v. DOCKET NO. EMha83050464

AMERICAN COMMERCIAL
BARGE LINE COMPANY,

Respondent.

RECOMMENDED FINDINGS OF
FACT, CONCLUSIONS OF
LAW, AND ORDER

A hearing was held in Jeffersonville, Indiana before the undersigned Hearing Officer for the Indiana Civil Rights Commission ("ICRC") on December 3, 1985.[1] Complainant, Donna Marie Witte ("Witte"), was present and was represented by counsel, Mr. Roy D. Rogers. Respondent, American Commerial Barge Line

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1/ Complainant was married after the filing of the complaint and changed her surname to Witte. Although the complaint and various other documents refer to her by her maiden name - Barone -, the parties have agreed that the complaint shall be deemed to reflect the change in surname. SECOND PRE-HEARING STATEMENT AND NOTICE OF HEARING ¶3 (October 02, 1985).

Company ("ACBL"), was represented by counsel, Mr. Robert W. Kilroy.

Preliminary motions to admit Joint Exhibits A, B, C, and D (hereinafter "JX____"); Complainant's Exhibits 1, 2, and 3 (hereinafter ("CX____"); and Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, and 8 (hereinafter "RX____") were granted and all those exhibits were admitted into evidence with out objection. Witte waived the right to make an opening statement and an opening statement was then made on behalf of ACBL.

Witte testified and also called Michael P. Sheehan ("Sheehan") and Frederick A. Silver to testify on her behalf. After Witte rested, ACBL called Christian Brinkop and Sheehan to testify on its behalf. Witte chose not to present any evidence in rebuttal.

The parties agreed that, in lieu of closing statements, briefs would be filed on or before January 10, 1986 and the cause was taken under advisement. On January 10, 1986, ACBL filed Respondent's Trial (sic) Brief In

Support of A Recommended Order for Dismissal and Witte filed Complainant's Final Argument.

Having carefully considered the testimonial and documentary evidence and the arguments of counsel, and being duly advised in the premises, the Hearing Officer now recommends that ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Witte is a twenty-eight (28) year old female who has had no vision in her right eye since birth.

2. ACBL is a wholly owned subsidiary of American Commerical Lines ("ACBL"), which is a wholly owned subsidiary of CSX Incorporated ("CSX"). A fleet of towboats and barges is operated by two sister companies, Inland Tugs ("Inland") and MAC Towing ("MAC"). ACL provides contracts of affreightment to its customers through Inland and MAC. ACBL provides a variety of administrative services to these sister companies, such as payroll, hiring,

training, and vendor payments. There had been no claim that ACBL, ACL, CSX, Inland, or MAC has, at any material time, employed less than six (6) persons for wages or salary.

3. On November 12, 1982, Witte applied for a position as a cook. JXA.

4. To be employed through ACBL, an applicant must meet various physical standards and take a physical examination. See RX7.

5. One of those physical requirements is that vision, uncorrected, can be no worse than 20/100 in one eye and 20/70 in the other and, corrected, can be no worse than 20/50 in one eye and 20/30 in the other. CX2, RX7.

6. Witte took the physical examination on February 22, 1983. JXB.

7. In March of 1983, she was advised that she would not be employed because she did not meet ACBL's vision requirements. This decision was made in ACBL's Jeffersonville office.

8. Witte filed the instant complaint with ICRC on May 6, 1983. She was certified as handicapped by a representative of the Indiana Rehabilitation Services Board on

United States Supreme Court in McDonnell Douglas Corp. v. Green (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668?

(4) Did the trial court erroneously conclude that business necessity justifies American's minimum vision requirements?

(5) Does Witte's visual handicap disqualify her from performing safely and efficiently the job of barge cook?[1]

DISCUSSION AND DECISION

ISSUE ONE:

Witte first contends the trial court erroneously concluded that this case was beyond the jurisdiction of the Indiana Civil Rights Commission. Congress has conferred on the federal district courts original jurisdiction of any civil case of admiralty or maritime jurisdiction. 28 U.S.C. §1333(1). See also, Southern

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1 Because our holding on issues one and two is dispositive, we need not address the remaining issues.

Pacific Co. v. Jensen (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086. The operation of a vessel on navigable waters is a traditional maritime activity to which the admiralty jurisdiction of the federal courts extends. St. Hilare Moye v. Henderson (1974), 8th Cir., 496 F.2d 973, 979. It is undisputed that American is in the business of operating vessels on navigable U.S. waterways. None of American's vessel employees work aboard vessels located in the State of Indiana. Witte sought and was denied employment aboard one of American's vessels. Thus, her claim against American for handicap discrimination clearly falls within the federal court's exclusive admiralty jursidiction. The civil rights commission, therefore, acted in excess of its jurisdiction. IND. CODE 4-22-1-18(3).

ISSUE TWO:

Witte next contends the trial court erroneously applied the doctrine of federal preemption. The Supremacy Clause of Article VI of the United States Constitution empowers

B. From (or to) another vessel such as a small motorboat or a tugboat.

C. From land by using a ladder which

In all these cases, the crew member must be carrying his or her baggage.

16. Walking the tow necessarily involves avoiding a number of obstacles and perils. These can include wires, lines, ratchets, pumps, manholes, cargo, snow and/or ice, and "duck ponds."[2]

17. Witte has an Associates Degree in food administration and has worked as a cook in restaurants and children's camps. She participates in sports such as volleyball and softball and drives an automobile without any

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2/ A "duck pond" is the area between four (4) adjoining barges. The "corner" of a barge is actually rounded. Thus, where four (4) barges meet there is an open area, large enough for a person to fall through. A barge is twelve (12) feet deep and, under a typical load, nine (9) feet is below the water level. A person who falls into a duck pond while the vessel is moving will not survive. Surviving such a fall even while the vessel is not going up or down the river would seem to be very fortunate.

license restriction. Like most persons with monocular vision, she has "acquired depth perception", that is, she has learned to judge depth and distance from the size of known cues, such as the width of a road or the size of a known object.

18. ACBL has admitted that Witte had the qualifications necessary to be employed as a cook. CX1. This admission, which must be treated as conclusive[3], has the effect of establishing that Witte was able to transfer the groceries and to get on and off the vessel.

19. ACBL denied, and continues to deny, that Witte had the qualifications for employment as a seaman. CX1. ACBL contends that circumstances can, and do, arise requiring a cook to perform the duties of a seaman and that the cook must have the ability to do so.

20. ACBL has not proved by a preponderance of the evidence that Witte was unable to safely and efficiently perform the duties required in the job of cook.

3/ See Conclusion of Law 8, infra.

A. There is no evidence that cooks are trained to perform duties of seamen at all.

B. The very form that ACBL requires the examining physician to complete has certain questions which are to be answered for deckhands only. Though the vision questions is in the section pertaining to both deckhands and cooks, some of the questions which pertain only to deckhands concern attributes which would be useful, if not necessary, in responding to emergencies. [For example, the ability to lift objects, climbing through small openings, working at heights while exposed to edges, climbing while carry loads, working and walking on uneven surfacts, working (in) inclement weather, and working in those conditions for long periods] JXB. This clearly indicates that ACBL does not really expect the cook to be

performing the duties of a seaman.

C. Given the finite number of crew members and the uncertain availability of timely assistance from elsewhere, the crew members must depend on each other in any emergency. In the event of incapacity from injury, illness, or worse, multiple skills and knowledge could be very helpful. Nonetheless, the evidence, on this record, does not support a finding that the cook was, in fact, required to perform the duties of a seaman.

D. ACBL has convincingly demonstrated that employment on such vessels is a hazarous undertaking. It has not demonstrated that the employment of Witte would increase any hazard.

21. ACBL refused to hire Witte because of her handicap.

22. Witte's monocular vision does not prevent her from performing the duties required in the job of cook.

23. Had Witte been hired on February 26, 1983,[4] she would have earned, through the date of the hearing, a total of Forty-Five Thousand Nine Hundred Eighty-Six Dollars and Sixty-Four Cents ($45,986.64),[5] broken down by years as follows:

1983 (from February 26, 1983)	$14,012.34
1984	$15,669.54
1985 (through December 3, 1985)	$16,304.76
TOTAL	$45,986.64

24. There is some evidence indicating that Witte has earned some income since the rejection by ACBL; however, there is no evidence of the amount she has earned.

25. There is no evidence of any gainful employment that Witte could, or even might, have obtained but did not, either because she

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4/ Witte's physical examination was completed on February 25, 1983. JXB.

5/ The figures are an average of the three (3) persons who would have been immediately above and the three (3) persons who would have been immediatley below Witte on the seniority list and come from JXD. For 1983 and 1985, daily averages were used. An annual rate for persons hired during 1983 was also derived by applying a daily rate.

failed to apply, because she rejected an offer of employment, or for any other reason.

26. Any Conclusion Of Law that should have been deemed a Finding Of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. ACBL and Witte are each a "person" as that term is defined in Ind. Code §22-9-1-3(a). Cf. 910 IAC 1-1-1(A).

2. ACBL is an "employer" Ind. Code §22-9-1-3(h),(i),Cf. 910 IAC 1-1-1(H)(I).

3. Congress defines the federal government's admiralty and maritime jurisdiction as follows:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water. . . .46U.S.C.§740.

4. The instant case does not arise out of injury to person or property on navigable water.

5. Congress' admiralty and maritime jurisdiction does not preclude the state of Indiana from regulation hiring decisions made within

the state's boundaries, even though the employment is primarily on navigable waters.

6. The requirement formerly imposed by Ind. Code §22-9-1-13 [or §22-9-1-13(c)] that a complainant alleging handicap discrimination be certified as "handicapped" by the Indiana Rehabilitation Services Board did not need to be fulfilled within the ninety (90) day period allowed for the filing of a complaint under Ind. Code §22-9-1-3(o).

7. ICRC has jurisdiction over the subject matter and the parties.

8. If a matter is admitted in response to a Request For Admission served pursuant to Ind. R. Tr. P. 36(A) (hereinafter "TR._____"), that matter is conclusively established unless, on motion, withdrawal or amendment of the admission is permitted. TR. 36(B), Pathman Construction Company of Highland Park, Illinois v. Drum-Co Enginerring Corporation (1980), Ind.App., 402 N.E.2d 1.

9. The following subsections of the Indiana Civil Rights Law are relevant:

> (l) The term "discriminatory practice" means the exclusion of a person, (sic) from equal opportunities because of... handicap...; or a system which excludes persons from equal opportunities because of...handicap....Every discriminatory practice relating to...employment...shall be considered unlawful unless it is specifically exempted by this chapter. Ind. Code §22-9-1-3(l).
>
> (q) "Handicap or handicapped" means the physical or mental condition of a person which constitutes a substantial disability. In reference to employment, under this chapter, "handicap or handicapped" also means the physical or mental condition of a person which constitutes a substantial disability unrelated to such person's ability to engage in a particular occupation. Ind. Code §22-9-1-3(q). (Emphasis supplied).
>
> (a) The prohibition against discrimination in employment, (sic) because of handicap does not apply to the failure of an employer to employ ...any person who because of a handicap is unable to safely and efficiently perform, at the standards set by the employer, the duties required in that job. Ind. Code §22-9-1-13(a). (Emphasis supplied).

10. Neither "occupation" nor "job" is expressly defined in the statute; however, the former is clearly more general than the latter. Thus, in determining whether a complainant's condition is "unrelated to the ability to en-

gage in a particular occupation," ICRC must examine the effects of the condition on the complainant's ability to perform the tasks directly related to the central functions of the occupation. Powell v. Board Of School Trustees, North Judson - San Pierre School Corp., ICRC Docket No. EMha81050486 (August 20, 1982).

11. Witte is "handicapped" and her condition constitutes a "handicap" as those terms are defined in Ind. Code §22-9-1-3(q).

12. ACBL committed a discriminatory practice when it refused to hire Witte because of her handicap.

13. ACBL has the burden of proving that the facts are such that Ind. Code §22-9-13(a) exempts that practice. Powell, supra., see also Maine Human Rights Commission v. Canadian Pacific Limited (1983), Me., 458 A.2d 1225, 31 FEP Cases 1028, Sterling Transit Company, Inc. v. Fair Employment Practices Commission (1981), Cal. App., 175 Cal. Rptr. 548, 28 FEP Cases 1351, Dairy Equipment Company v.

Department of Industry, Labor, and Human Relations (1980), 95 Wis.2d 319, 290 N.W.2d 330, 28 FEP Cases 1355.

14. ACBL did not meet its burden of proving that Witte was unable, because of her handicap, to safely and efficiently perform the duties of the job.

15. ACBL committed an unlawful discriminatory practice when it refused to employ Witte.

16. Upon finding that a person committed an unlawful discriminatory practice relating to employment, ICRC is empowered to order that person to (a) cease and desist from that practice; (b) take further affirmative action to effectuate the purposes of the Indiana Civil Rights Law; (c) restore Complainant's losses; and (d) file proof of compliance at periodic intervals. Ind. Code §22-9-1-6(k)(1).

17. The power to require "further affirmative action" includes the power to require the employment of the prevailing complainant. Indiana Department of Correction v. Indiana Civil Rights Commission (1985), Ind. App.,

____N.E.2d____, Indiana Civil Rights Commission v. Midwest Steel Division of National Steel Corporation (1983), Ind. App., 450 N.E.2d 130.

18. The question of mitigation of damages is a matter of defense, with the burden of proof resting with the party held liable in damages. Colonial Discount Corporation v. Berkhardt (1982), Ind. App., 435 N.E.2d 3419, Sigsbee v. Swathwood (1981), Ind. App., 419 N.E.2d 789.

19. ACBL has not proven that Witte failed to take reasonable steps to mitigate her damages.

20. Mathematical certainty is not required for an award of damages and any doubt as to the amount of damages must be resolved against the wrongdoer. Indiana Tri-City Plaza Bowl, Inc. v. Estate of Glueck (1981), Ind. App., 422 N.E.2d 670.

21. Any Finding Of Fact that should have been deemed a Conclusion Of Law is hereby adopted as such.

ORDER

1. ACBL shall cease and desist from categorically denying employment as cooks to persons having monocular vision.

2. ACBL shall deliver to ICRC a check, payable to the order of Donna Marie Witte, in the amount of Forty-Five Thousand Nine Hundred Eighty-Six Dollars and Sixty-Four Cents ($45,986.64), minus deductions required by law.

3. ACBL shall do one of the following:

A. Offer Witte employment as a cook promptly upon the effective date of this Order; or

B. Offer Witte employment as a cook the first time such a position becomes vacant and pay her, each month, an amount equal to the average wages earned by the three (3) cooks who would be immediately above her on the seniority list and the three (3) cooks who would have been immediately below her on that list that month minus her actual earnings that month,

if any.

Should Witte refuse such an offer, ACBL shall have no obligation to employ her to comply with this Order.

4. Upon her employment, Witte shall be granted retroactive seniority and treated, for all purposes, as if she had been continuously employed and working.

5. ACBL shall file, on or before the fifteenth day of January and July of each year, a report concerning the six (6) month period ending the preceding December 31 or June 30, respectively, containing:

A. A list naming every person hired for, or transferred to, a position as cook; and

B. A list naming every person who expressed an interest in a position as a cook. Copies of all applications, letters, and related documents shall be included; and

C. As to any situation where a person who has expressed an interest

is not hired for an available position as a cook for failure to meet vision standards, a statement of all reasons why the person was not selected and what efforts were made to evaluate that individual's capability to perform the duties of a cook.

Nothing herein shall preclude ICRC from requesting and obtaining additional information relevant to a determination of whether ACBL has complied with this Order.

6. ACBL's reporting obligations shall terminate after it has filed four (4) consecutive reports with no determination by ICRC that ACBL has not complied with the terms of this Order.

7. This Order shall take effect thirty (30) days after approved by a majority of the members of ICRC unless modified by ICRC pursuant to Ind. Code §4-22-1-26 or stayed by a

court of competent jurisdiction.

Dated: 20 January 1986

Robert D. Lange
Robert D. Lange
Hearing Officer

APPENDIX D

THE COMPLETE TEXT OF THE CLARK SUPERIOR COURT NO. 1's PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT ENTERED ON APRIL 8, 1987

STATE OF INDIANA

IN THE CLARK SUPERIOR COURT NO. 1

AMERICAN COMMERCIAL BARGE
LINE COMPANY,

PETITIONER

VS. CAUSE NO. 86-S1-80

INDIANA CIVIL RIGHTS
COMMISSION,

RESPONDENT

PROPOSED
FINDINGS OF FACT
CONCLUSIONS OF LAW
JUDGMENT

This matter came before the Court upon a Verified Petition for Judicial Review pursuant to the provisions of the Administrative Adjudication Act, IC 4-22-1-1 et seq.

(H.I.)

The Court, after full opportunity to brief and argue in open Court as to the parties respective positions on all the issues, and being duly advised in the premises after a complete review of the Record as a whole, now makes the following Findings of Fact, Conclusions of Law, Order and Judgment.

FINDINGS OF FACT

1. The Court has jurisdiction over this matter pursuant to IC 4-22-1-14, and the Court further finds that all jurisdictional requirements have been satisfied.

2. On May 16, 1986, the Indiana Civil Rights Commission (hereinafter ICRC) made its Findings of Fact, Conclusions of Law, and Order in the matter of Donna Marie Witte v. American Commercial Barge Line Company (hereinafter ACBL), Docket No. EMha83050464 by adopting the Recommended Findings of Fact, Conclusions of Law, and Order of its Hearing Officer dated January 20, 1986.

3. Witte is a 28 year old female who has no vision in her right eye due to a birth defect, and, is a handicapped person as defined at IC 22-9-1-3(a).

4. ACBL is engaged in the maritime transportation business with its principle offices located in Jeffersonville, Indiana, and, is an employer as defined at IC 22-9-1-3(h), (i).

5. All hiring decisions, personnel re-

cords, and payroll for all vessel employees of ACBL are maintained in Jeffersonville, Indiana.

6. All vessel employees work aboard vessels (towboats and barges), of ACBL upon the navigable waters of the United States including but not limited to the Ohio River, Upper and Lower Mississippi River, Illinois River, Gulf of Mexico and other coastal and inland waterways.

7. No vessel employees work aboard vessels located in the State of Indiana or at any other location in the State of Indiana.

8. All vessel employees have the status of seamen under federal maritime law.

9. All applicants for employment aboard ACBL vessels must possess minimum physical standards, including minimum vision requirements in each of two eyes.

10. These minimum physical standards, including minimum vision standards, are the result of U.S. Coast Guard criteria, and, the experience and expertise of the inland maritime industry, and as such, they are bona-

fide occupational qualifications directly related to the performance of nominal and emergency duties aboard company vessels.

11. Vessel emergencies include sinkings, groundings, loss of power, collision, fires, man-overboard and rescue operations.

12. All vessel employees, regardless of classification and/or occupation, respond to vessel emergencies.

13. On or about November 12, 1982, Witte applied to ACBL for employment as a cook aboard ACBL vessels.

14. On or about March 8, 1983, Witte was denied employment as a cook by ACBL aboard ACBL vessels for the reason she did not meet minimum vision standards.

15. Business necessity and safety in the maritime environment upon the navigable waters of the United States requires that ACBL employ only seaworthy persons as crew members aboard company vessels.

16. Due to her lack of vision in one eye, and her failure to meet minimum vision require-

ments uniformly required of all seaworthy crew members, Witte was not a seaworthy person.

17. Based on the record as a whole, ACBL did not discriminate against Witte on the basis of her handicap as she was not a qualified handicapped individual, and in the maritime environment, she presented a hazard to herself; crew members and the vessel. With one eye, in the face of an emergency, and the lodging of a foreign object in her good eye, Witte would be blind as well as a burden to the vessel and crew.

18. The Findings of Fact, of the ICRC, based on the Record as a whole, are not supported by substantial evidence.

Any of the foregoing Findings of Fact that may be construed as a Conclusion of Law are hereby so adopted.

CONCLUSIONS OF LAW

1. The admiralty and maritime jurisdiction of the United States is set forth and defined in Article III, Section 2 of the United States Constitution which provides:

"The judicial power shall extend. . . to all Cases of admiralty and maritime jurisdiction."

2. The purpose of this grant of admiralty and maritime jurisdiction to the Federal Government was to produce essential harmony and uniformity. U.S. Constitution, Preamble.

3. The several States are prohibited from making conflicting laws on subjects of national interest and regulation. Martin v. Hunters Lessee 14 U.S. 304 (1816).

4. There necessarily remains to the States until Congress acts, a wide range of permissable exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases 230 U.S. 352 (1913). However, where a conflict exists, the State legislation must fail. Gibbons v. Ogden 9 Wheat 1, (1830), Kelly v. State of Washington, ex rel Foss Company Inc. 302 U.S. 1 (1937).

5. State legislation is not permitted to displace the characteristic and unique features of maritime law, or to impair the uniformity designed to be established in conferring maritime jurisdiction on the United States. Southern Pacific Company v. Jensen 224 U.S. 225 (1917), Union Fish Co. v. Erikson 248 U.S. 308 (1918), Knickerbocker Ice Co. v. Stewart 253 U.S. 149 (1920), Just v. Chambers 302 U.S. 383 (1941), Romero v. International Terminal Operating Co. 358 U.S. 354 (1959), Oil, Chemical, Atomic Workers International Union v. Mobil Oil Co. 426 U.S. 407 (1976).

6. Congress and Federal Courts have paramount and undisputed power to fix, determine, alter and revise the maritime law which shall prevail throughout the United States. Waring v. Clarke 48 U.S. 441 (1847), The Lattowanna 88 U.S. 558 (1875), Longshoremen and Harbour Workers Compensation Act 33 U.S.C. 901 et seq, Federal Employers Liability Act 45 U.S.C. 50 et seq, Jones Act 46 U.S.C. 688.

7. All vessel employees of ACBL are sea-

men pursuant to the provisions of 46 U.S.C. 713:

> ". . . every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person 'apprentices excluded' who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river. . ."

8. Federal Courts have determined that a seaman has a right to indemnity for a shipowners failure to maintain a vessel in seaworthy condition, that is, fit for a particular purpose. The Osceola 189 U.S. 158 (1903).

9. The doctrine of seaworthiness applies where the condition is only temporary and unknown to the vessel owner. Mitchell v. Trawler Racer Inc. 362 U.S. 531 (1960).

10. The doctrine of seaworthiness applies where equipment is defective. Mahnick v. Southern S.S. Co. 321 U.S. 96 (1941).

11. The doctrine of seaworthiness applies where insufficient manpower is assigned to a particular task, or where a seaman is incompetent. Waldron v. Moore-McCormack Lines Inc. 386 U.S. 724 (1967) Boudoin v. Lykkes Brothers Steamship Co. Inc. 348 U.S. 336 (1955).

12. Under the judicially fashioned doctrine of seaworthiness, ACBL as a maritime employer has the obligation to furnish a seaworthy vessel, equipment and crew to its maritime employees.

13. A seaworthy crew member is one who is measured by the"usual and customary standard of the calling". Boudoin, supra.

14. Witte, with her lack of vision in one eye, does not meet the standard of vision in both eyes as is the usual and customary practice applied to all maritime employee crew members on ACBL vessels as a bona-fide occupational qualification.

15. For the maritime employer, the doctrine of seaworthiness defines business necessity and safety.

16. The failure of the ICRC to consider, distinguish and/or apply exclusive maritime law and principles to this matter was arbitrary, contrary to constitutional rights, powers, privileges, and immunities, and in excess of statutory jurisdiction, authority and limitation.

17. The application of Indiana Employment discrimination law to exclusive admiralty and maritime jurisdiction of the United States is unlawful. Jensen, Knickerbocker, OCAW supra.

18. The burden of proof in employment discrimination cases is on the Complainant. After Complainant has made a prima-facie case of discrimination, the burden shifts to the employer to articulate legitimate non-discriminatory reasons for not employing Complainant. The burden then shifts back to Complainant to demonstrate the employers reasons are pretextual. Indiana Department of Corrections v. Indiana Civil Rights Commission 486 N.E.2d 612 Ind. App., (1985), Indiana Civil Rights Commission v. Midwest Steel Division 450 N.E.2d 130

Ind. App., (1983).

19. Complainant proved her prima facie case and ACBL articulated legitimate reasons for not employing Complainant. Complainant failed to present any evidence that the reasons articulated by ACBL for not employing Complainant were a pretext, unreasonable, mistakenly applied or unlawful.

20. In the absence of this proof, and in the absence of the proper allocation of the burden of proof, the Conclusions of Law of the ICRC that ACBL:

(a) committed a discriminatory practice;

(b) failed to meet its burden of proof; and

(c) committed an unlawful discriminatory practice;

are arbitrary, capricious, and an abuse of discretion. Additionally, the aforesaid Conclusions of Law by the ICRC are without the observance of proper procedure required by law, and, not supported by substantial evidence in the Record, and, contrary to applicable principles of law.

21. ACBL did not commit an unlawful employment practice as defined at IC 22-9-1-3. Based on the record as a whole, and applicable law, the reasons and actions of ACBL are exempt under the business necessity and safety provisions as defined at IC 22-9-1-13(a).

Based on the foregoing, and a complete review of the whole Record in the matter, the Court now grants Petitioners' request for relief by setting aside the Findings of Fact, Conclusions of Law, and Order of the ICRC dated May 16, 1986.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Findings of Fact, Conclusions of Law, and Order of the Indiana Civil Rights Commission dated May 16, 1986, should be, and hereby are, set aside.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Verified Petition and Counter-Claim for Enforcement filed by the Indiana Civil Rights Commission should be, and hereby is, dismissed.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that all parties are to bear their own costs in this matter.

SO ORDERED THIS 8 DAY OF April, 1987.

Clementine B. Barthold
CLEMENTINE B. BARTHOLD,
Judge
Superior Court No. 1

APPENDIX E

THE COMPLETE TEXT OF THE INDIANA COURT OF APPEALS DENIAL OF APPELLANT'S PETITION FOR REHEARING ENTERED ON JULY 5, 1988

ROY D. ROGERS
32 E. Washington St.
Suite 900
Indianapolis, IN 46204

Cause Number

10A01-8708-CV-00200
LOWER CAUSE
86-S1-80

INDIANA CIVIL RIGHTS COMM & WITTE V AM COMM
BARGE LINE CO

You are hereby notified that the COURT OF APPEALS has on this day 7/05/88 APPELLANT'S PETITION FOR REHEARING DENIED.

WESLEY W. RATLIFF, JR., CHIEF JUDGE.

Witness my name and the seal of said Court, this 5th day of July, 1988

S/_____
Clerk Supreme Court,
Court of Appeals and Tax
Court

APPENDIX F

THE COMPLETE TEXT OF THE INDIANA SUPREME COURT'S DENIAL OF TRANSFER ENTERED ON JANUARY 4, 1989

ROY DAVID ROGERS
32 E. Washington St.
Suite 900
Indianapolis, IN 46204-
0000

Cause Number
10A01-8708-CV-00200
LOWER CAUSE
86-S1-80

INDIANA CIVIL RIGHTS COMM & D. WITTE V AM COMM
BARGE LINE CO

You are hereby notified that the SUPREME COURT

has on this day 1/04/89 APPELLANTS' PETITION FOR TRANSFER TO THE INDIANA SUPREME COURT IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR, EXCEPT DEBRULER, J., WHO IS NOT PARTICIPATING.

WITNESS my name and seal of said Court,
this 4th day of January, 1989

S/ Dan Heiser
Clerk Supreme Court,
Court of Appeals and
Tax Court

IN THE SUPREME COURT
OF THE UNITED STATES

NO.

INDIANA CIVIL RIGHTS COMMISSION and DONNA MARIE WITTE,
Petitioners

v.

AMERICAN COMMERCIAL BARGE LINE COMPANY,
Respondent

PROOF OF SERVICE

I, Gary C. Lamey, counsel of record for the Indiana Civil Rights Commission and Donna Marie Witte, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of May, 1989, I served three copies of the foregoing corrected Petition for A Writ of Certiorari to the Indiana Court of Appeals in the above-captioned cause on the Respondent, American Commercial Barge Line Company, as follows:

1. by depositing same in the U.S. Mail, first-class postage prepaid, to ~~counsel~~ of record for Respondent, being Robert W. Kilroy, 110 Hampstead Village, Hampstead, N.C. 28443

It is further certified that all parties required to be served have been served and that the list of each parties is as set forth above.

Gary C. Lamey

Gary C. Lamey
Attorney for Petitioners
Indiana Civil Rights Comm.
32 E. Washington Street
Suite 900
Indianapolis, IN 46204